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No. [redacted] 86

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1945

GEORGE WILLIAM DODEZ, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

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INDEX

Subject Index

	PAGE
Summary of matters involved	1
Statement of case	4-8
Form of action	4
Facts	5
How issues were raised	8
Specification of errors	11
Reasons relied on for granting the writ	11
Conclusion	12
Supporting brief	13-21
Preliminary	13
Additional argument	13
Conclusion	21

Cases Cited

PAGE

Billings v. Truesdell
321 U. S. 542, 558-559 ..... 11, 15, 17, 18

Estep v. United States
— U. S. —, 66 S. Ct. 423, 425-429 ..... 2, 11, 15

Falbo v. United States
320 U. S. 549 ..... 2, 11, 13, 14, 15, 17

Gibson v. United States
— U. S. —, 66 S. Ct. 677
No. 221 Oct. T. 1945, argued and submitted Jan. 2-3, 1946; on Feb. 25, 1946, ordered reargued before full court 11, 12, 13, 21

Government's brief:
pp. 15-16 18
pp. 53-58 19

Gonzales v. Williams
192 U. S. 1, 15 20

Kansas City S. Ry. v. Ogden Levee Dist.
15 F. 2d 637 (CCA-8) 20

Smith v. United States
148 F. 2d 288 20

Utley v. St. Petersburg
292 U. S. 106 20

Statutes and Regulations cited

	PAGE
Judicial Code, Sec. 240 (a), as amended by Act of Feb. 13, 1925	1
Opinion No. 14, Director, Selective Service System	10
Rules of Criminal Appeals (May 7, 1934), Rules XI, XIII	1
Selective Service Regulations (32 C. F. R. 601.5 *et seq.*) section—	
621.13	2
622.44	2
622.51	2
623.1 (c)	2
627.25	2
629.1	2, 13
629.2	2
629.32	2
651.1-651.8	2, 13
651.10	2, 13
651.31	2
651.31 (a) (1)	17
652.1	2, 13
652.2	2, 13
652.11	2, 14
652.13	2, 16
653	17
653.1	2
653.5	2
653.11	2, 14
653.11 (a)	18
653.11 (b)	18
653.11 (c)	18
653.12	20
653.13	18
United States Code, Title 50, App. ss. 301-318 ["Selective Training and Service Act of 1940", as amended]	
[Sec. 3 (a)]	13
[Secs. 5 (d), 10 (a), 11]	2, 9
304 (a)	15
United States Constitution	
Article I, Sec. 9, clause 3	3, 8
Article III	3, 8
Amendment V	3, 8, 10
Amendment VI	3, 8

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, George William Dodez, presents this his petition for writ of certiorari and shows unto the Court as follows:

Summary of Matters Involved

1. *Opinion of the court below.*

Opinion of the United States Circuit Court of Appeals is not yet reported in the Federal Reporter. It appears in the record certified to this Court. [189-200]*

2. *Jurisdiction.*

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

*Bracketed figures appearing in this petition and the supporting brief refer to pages of printed transcript of the record.

3. *Timeliness of this petition.*

The judgment of the Circuit Court of Appeals was rendered and entered on March 18, 1946. [189] The petition for writ of certiorari is filed within thirty days of that date.

4. *Statutes and Regulations Involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318) are drawn in question here, as well as Sections 621.13, 622.44, 622.51, 623.1 (c), 627.25, 629.1, 629.2, 629.32, 651.1-651.8, 651.10, 651.31, 652.1, 652.2, 652.11, 652.13, 653.1, 653.5 and 653.11 of the Selective Service Regulations (32 C. F. R. 601.5 *et seq.*) promulgated by the President under said Act.

5. *Questions presented.*

(1) Does acceptance upon preinduction physical examination of one classified as a conscientious objector constitute completion of the selective process and exhaustion of administrative remedies so as to qualify petitioner to challenge the legality of the administrative action in defense to an indictment charging him with failure to report for work of national importance in a civilian public service camp?

(2) Did the courts below err in holding that the rule of *Falbo* v. *United States* (320 U. S. 549) applied and that the rule of *Estep* v. *United States* (66 S. Ct. 423) did not control?

(3) Where the undisputed evidence shows that the local board was prejudiced against petitioner and violated his rights to procedural due process by denying him a full and fair hearing, may he show in defense to the indictment that the administrative agency acted illegally and unconstitutionally, and that the order on which the indictment is based is void?

(4) Did the trial court err in refusing to allow petitioner the right to show, and in refusing the jury the right to consider that the order on which the indictment was based is void because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) contrary to the undisputed evidence, (e) without support of substantial evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

(5) Did the trial court err in holding that it and the jury could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided to whether or not petitioner knowingly failed to report for work of national importance?

(6) Does the construction placed upon the Act and Regulations by the courts below, requiring petitioner to report at a civilian public service camp for work of national importance as a condition precedent to judicial review of the illegality and unconstitutionality of the action of the Selective Service System, violate Clause 3, Section 9 of Article I, Article III, and the Fifth and Sixth Amendments to the United States Constitution?

(7) Did the trial court err in denying petitioner's motion to quash the indictment, motion for an instructed verdict and for a judgment of acquittal, in excluding proffered evidence, in denying requests for charges and in charging the jury, all of which pertained to the illegality of the administrative order?

Statement of Case

FORM OF ACTION

This criminal action was instituted by indictment returned against petitioner charging him with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [2-3]

The indictment charged that petitioner, a registrant classified as a conscientious objector, "did knowingly, wilfully, unlawfully and feloniously, fail to perform such duty required of him; that is to say, that the said defendant, did fail to report for work of national importance as ordered by said Board". [3]

Thereafter petitioner pleaded "not guilty". [3] He filed a motion to quash the indictment on the grounds that the construction placed upon the criminal sanctions clause so as to deny him his right to show, in defense to the indictment, that the orders of the Selective Service System were void and illegal, violated the Constitution of the United States. [35] The motion to quash was overruled, after argument to the court, on December 7, 1944. [9] The trial to a jury before the court began on December 7, 1944. [9] The court excluded and received evidence upon the trial. The case closed when all the evidence was in on December 7, 1944. [3, 67] At the close of the evidence, petitioner moved for dismissal of the indictment and for a judgment of acquittal [6-8, 16, 65, 127-130] and for a directed verdict of not guilty. [6-8, 16, 65, 127-130] In these motions the reasons were stated extensively. [6-8] The motions were denied with exceptions to petitioner. [16, 65] Petitioner duly submitted to the court, before argument of counsel to the jury, his requested instructions to the jury. [66-101]

On December 8, 1944, the cause was argued to the jury by counsel. [60-104] Thereupon the court charged the jury. [104-108] The court refused all of petitioner's requested

charges to the jury and allowed exceptions to his ruling. [109] Petitioner duly objected and excepted to the court's charge. [109-111] The jury retired to consider the verdict at 2:00 p.m. [12] The jury rendered its verdict of guilty on December 8, 1944, at 3:00 p.m. [112, 127] On December 15, 1944, the United States District Judge rendered judgment upon the verdict and sentenced petitioner, committing him to the custody of the Attorney General for a period of five years. [121, 130-131]

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. [132] He timely filed his assignments of error which support each ground of this petition. [135-142] In due course the case was argued and submitted to the United States Circuit Court of Appeals for the Sixth Circuit. The judgment of conviction was affirmed by that court on March 18, 1946. [189]

FACTS

Petitioner registered pursuant to the Selective Training and Service Act on June 30, 1942. [156] On September 21, 1942, he filed his Selective Service Questionnaire. [146] He showed his occupation to be that of a duly ordained minister of religion since January 1941. [17, 146-148] In his questionnaire he asserted: "In view of the facts set forth in this Questionnaire it is my opinion that my classification should be 4D." [18, 148] He filed with his questionnaire certificates of ordination showing that he was recognized by the Watchtower Society, the legal governing body of Jehovah's witnesses, as an ordained minister of the gospel. [157-159] Affidavits were also filed showing that petitioner's full time was devoted to the regular performance of his duties as a minister of religion and that he stood in relation to the congregation of Jehovah's witnesses as do the ministers of orthodox denominations. [159-165] On November 25, 1942, the local board

classified him in Class I-A, sending him notice thereof on November 30, 1942. [150] Thereafter, on December 3, 1942, he requested a personal appearance before the local board pursuant to the Regulations. [167-168] On December 7, 1942, he appeared before the local board and submitted a petition signed by forty-four persons stating that they recognized him as a minister of Jehovah's witnesses and the Watchtower Society and that he regularly preached and taught the principles of Jehovah's witnesses. [168-169] At such personal appearance the local board denied him a full hearing but evidence of the denial was excluded from the record. An offer of proof was made. [33-36] He was continued in Class I-A on December 7, 1942, notice thereof being mailed to him on December 8, 1942. [150] Petitioner thereafter requested a rehearing for the opportunity to present additional evidence. This proof was rejected by the court. [36-37]

He appealed to the board of appeal on December 17, 1942. [149] In his notice of appeal he complained of the failure of the local board to give him a full and fair hearing. He also complained of the refusal of the local board to grant him a rehearing in order to enable him to offer additional evidence. [170] He accused the local board of being prejudiced, unfair and capricious. [171] Pending the determination of his appeal, he notified the local board that he had been appointed as the presiding minister of the congregation of Jehovah's witnesses at Wooster, Ohio. [172-173]

On June 11, 1943, he was notified that the board of appeal had reclassified him to Class IV-E, [150] which made him liable to do work of national importance in a civilian public service camp. Thereafter he attempted to have his case reopened. In dealing with the Government Appeal Agent and members of the local board, there were statements made about prejudice on the part of the local board. How-

ever, evidence as to this was excluded by the court. It is shown in an offer of proof. [37-44]

Additional evidence was submitted and request again made to have his classification reopened in January 1944. Such evidence consisted of an affidavit and petition stating that petitioner regularly and customarily served as and performed the duties of a duly ordained minister and presiding minister over the congregation of Jehovah's witnesses, teaching and preaching the beliefs of Jehovah's witnesses, and certifying that he was authorized to perform marriages, baptism, funeral and other ceremonies generally performed by ordained ministers. [174] The signers of the petition alleged that it would result in a hardship to them if petitioner was taken away from the congregation. [174-176] With this was submitted a certificate issued May 18, 1943, by the State of Ohio, licensing petitioner to solemnize marriages within the State of Ohio as long as he continued as a minister of the Watchtower Society. [176] This additional proof was accompanied by a letter to the local board. [179-180] The local board declined to reopen his classification.

On February 10, 1944, the petitioner was mailed Order to Report Preinduction Physical Examination directing him to appear at the local board located at 243 West Market Street, Orrville, Ohio, on February 21, 1944. [182-183] He appeared as directed and was thereafter given preinduction physical examination at the induction station on February 21, 1944. [150, 184-186] Certificate of Fitness was thereafter sent petitioner on February 28, 1944. [150, 184-185] It certified that petitioner, after having been examined upon a preinduction physical examination, had been declared "Physically fit, acceptable by Army for general military service". [51-52, 184-185] The report of Physical Examination, dated February 21, 1944, appears in the Record. [185-186]

On April 8, 1944, petitioner was ordered to report for

work of national importance. [150, 155-156] The order recited that he had been assigned to C. P. S. Camp No. 28, at Medaryville, Indiana. It commanded him to appear at his local board at 5 a.m. on April 21, 1944. [150, 155] On April 19, 1944, petitioner, by letter, acknowledged receipt of the Order to Report for Work of National Importance. [186-187] He reviewed the illegality of the action of the administrative agency and, for the reasons stated in his letter, declared that he would not report because he could not turn aside from and quit his preaching occupation that he was bound to perform in accordance with the covenant made with Almighty God. [186-187] The petitioner failed to report at the local board, as commanded, to do work of national importance. [14-15, 150]

How Issues Were Raised

By motion to quash the indictment petitioner claimed that the administrative process had been sufficiently completed so as to permit him to challenge the legality of the classification and orders based thereon. [35] He asserted that if the Act and Regulations were so construed as to deny him these defenses, they were unconstitutional because a Bill of Attainder, contrary to Clause 3, Section 9 of Article I of the United States Constitution; because they surrendered the judicial power to the draft boards contrary to Article III of the Constitution; because they denied the right to a judicial trial contrary to the due process clause of the Fifth Amendment to the United States Constitution, because they deprived the petitioner of his right of trial by jury contrary to the Sixth Amendment to the United States Constitution. [35] The trial court overruled the motion to quash with exception to petitioner. [9, 10]

The trial court erroneously excluded from evidence, over the objection of petitioner, his own testimony offered *de novo* to show his activity as an ordained minister. This

testimony was offered for the purpose of showing that petitioner was exempt from all training and service under the Selective Training and Service Act. [30-32]

The trial court erroneously excluded from evidence, over the objection of petitioner, testimony tending to show prejudice and discrimination by the local board against petitioner, and evidence tending to show that the members of the local board had denied him a full and fair hearing before that board. [33-35, 36-44]

The trial court erroneously excluded from evidence, over the objection of petitioner, testimony offered *de novo* by petitioner to establish his background and training for the ministry. [50-51]

At the close of the evidence petitioner moved for a dismissal of the indictment [127-128] and for a directed verdict [128-130] on the grounds that the undisputed evidence showed that the draft board order was void because the board acted in excess of its authority in that petitioner was a minister of religion exempt from all training and service and was not liable for training and service under the Act; that he had exhausted his administrative remedies and was in a position to challenge the action of the administrative agency and the orders on which the indictment was based; that the board had denied him his rights of procedural due process by rejecting the evidence and that the court had construed the Act and Regulations so as to require him to report for work of national importance at a CPS camp as a condition precedent to a judicial review, which denies the petitioner the right of a judicial trial contrary to the Constitution of the United States. [127-130] Each motion was denied with exception to petitioner. [65]

Petitioner duly tendered to the court requested charges to the jury. [67-100] The requested charges defined what constituted a regular or duly ordained minister of religion, stated the duties of draft boards in considering the minis-

terial status of Jehovah's witnesses under the Act and Regulations as declared by the Director of Selective Service in Opinion No. 14. The court was requested to charge the jury that if they concluded and found that the undisputed evidence before the draft boards showed that petitioner was a minister of religion and of Jehovah's witnesses and there was no substantial evidence that he was not such a minister as claimed, that they could acquit the petitioner by their verdict saying he was not guilty. The court was requested to charge the jury that if they found that the boards acted in excess of authority, without jurisdiction, contrary to law, without support of substantial evidence, contrary to the undisputed evidence, contrary to the Constitution, the Act and Regulations and arbitrarily or capriciously, they could render a verdict of not guilty. These requests were each refused separately and exception allowed to each refusal.

The court instructed the jury that the only issue to be determined was whether or not the petitioner reported for work of national importance, and if the evidence showed that petitioner failed to so report, it would be the duty of the jury to find the petitioner guilty. Petitioner objected and excepted to the court's charge on the grounds that he was thereby denied the right to urge in defense to the indictment that he was exempt from training and service as a minister of religion; that the court instructed the jury to convict him; that the instruction of the court denied him his right to a judicial trial and a trial by jury, and abridged his rights and liberty contrary to the due process clause of the Fifth Amendment to the United States Constitution. [110-111]

Throughout the trial, from beginning to end, the court held that the actions of the draft boards were binding upon petitioner, the court and the jury, and that petitioner could not challenge the same on any ground, or that his failure

to report for work of national importance was not a willful violation of the Act.

Specification of Errors

Petitioner relies upon every one of his assignments of error as grounds for a reversal of the conviction.

Reasons Relied on for Granting the Writ

The holding of the court below conflicts with the holdings of this Court in *Billings* v. *Truesdell*, 321 U. S. 542, 558-559, and *Estep* v. *United States*, 66 S. Ct. 423, 425-429.

The holding of the court below that the questions presented by petitioner are disposed of in the holding of this Court in *Falbo* v. *United States*, 320 U. S. 549, which is said to be "on all fours with the case at bar", is such a drastic departure from the usual and accepted course of judicial proceedings as to call for the exercise of the power of supervision to halt the same and correct the injustice committed against petitioner.

Inasmuch as the Selective Service Regulations have been amended since the *Falbo* decision so as not to require a physical examination at the CPS camp as a condition precedent to determining the acceptability of the registrant for work of national importance, the decision in *Falbo* v. *United States, supra*, is not apposite.

Moreover, the instant case presents to this Court a question similar to that presented to this Court in *Gibson* v. *United States*, No. 221, October Term 1945, argued and submitted January 2-3, 1946, and ordered, on February 25, 1946, reargued before the full court. (66 S. Ct. 677) Inasmuch as the petition for writ of certiorari was granted in the *Gibson* case, it should be granted in this case. Since the questions urged in the *Gibson* case were sufficiently substantial to require reargument in that case, the same and correlative questions here presented should likewise

and for the same reasons be considered substantial enough to warrant the granting of the writ of certiorari here.

Conclusion

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; in the event the writ of certiorari is granted, petitioner prays that this cause be set for argument simultaneously or consecutively with No. 221, October Term 1945, *Gibson* v. *United States*, which has been ordered restored to the docket for reargument before the full court; and petitioner further prays that the judgment of said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court be here set aside and petitioner dismissed from custody or, in the alternative, the judgment be reversed and the cause remanded for a new trial not inconsistent with this Court's opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

GEORGE WILLIAM DODEZ, *Petitioner*
By VICTOR F. SCHMIDT
HAYDEN C. COVINGTON
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SUPPORTING BRIEF

Preliminary

For a statement as to the opinion of the court below, the basis on which the jurisdiction of this Court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.

The points of law pertaining to the right of the petitioner to show in defense to the indictment that the administrative order is void because the selective process has ended, thus completing the administrative remedies, have been fully discussed in the briefs of both parties filed in *Gibson* v. *United States*, No. 221, October Term 1945.

ADDITIONAL ARGUMENT

The Selective Training and Service Act of 1940 (§3a) in part provides: " . . . no man shall be inducted . . . until he is *acceptable* to the land or naval forces . . . and his physical and mental fitnesss for such training and service has been satisfactorily determined." (Italics added) The administrative process beginning "with registration with the local boards" ends "when the registrant is *accepted* by the Army, Navy or civilian public service camp." *Falbo* v. *United States*, 320 U. S. 549.

Section 629.1 of the Regulations provides that every registrant must be given a preinduction physical examination, which is a final-type physical examination for registrants classified as conscientious objectors (Reg. 651.1-651.8). If the conscientious objector is found physically fit, he is then assigned by the National Director of Selective Service to a designated civilian public service camp (Reg. 651.10, 652.1, 652.2). Pursuant to such assignment, the local board issues the order to report for work of national im-

portance. After the conscientious objector has been given a preinduction physical examination and has been assigned to a particular camp by the National Director, the local board then orders him to report at the board for transportation to the civilian public service camp to which he is assigned (Reg. 652.11). The Regulations provide that after arrival at the camp the registrant shall be examined to ascertain whether there has been a change in his physical or mental condition. But irrespective of the result of the physical examination he is accepted by the camp for work of national importance (Reg. 653.11). He cannot be rejected at the camp. If a change in his condition is found, he is hospitalized. The Regulations provide that the acceptance shall be noted after the physical examination. The camp director is required to place on the form a statement that the registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director (Reg. 653.11).

It is to be observed that there is said to be a difference in procedure as it is under present Regulations and as it was when Falbo was ordered to report for induction. Now it is impossible for a registrant to be rejected at the CPS camp after having reported. The court has said that this was not true at the time Falbo was ordered to report for induction (*Falbo* v. *United States*, 320 U. S.): "The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp."

It is manifest that the acceptance upon a preinduction physical examination ends the selective process. Petitioner was ordered to report for work of national importance after an amendment of the Selective Training and Service Act, dated December 5, 1943, which provided for acceptance

upon a preinduction physical examination before the order to report is issued. (50 U. S. C. App. §304 (a))

In *Billings* v. *Truesdell*, 321 U. S. 542, by a construction of the Regulations and the Act, it was ruled that at this point in the proceedings a registrant, when found physically and mentally fit, was to be deemed "acceptable" and is "accepted". The very next step, induction, was not and is not a part of the *selective process*. Unmistakably, the court pointed out that the *Falbo* decision was not to be construed as holding that a man must submit to induction before he could be said to have exhausted his administrative remedies, but that the *selective process* ended when he was accepted and that thereafter he could refuse to submit to induction:

"But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported for completion of the Selective Process to more severe penalties than those who stayed away in defiance of the board's order to report."

The foregoing quoted portion of the *Billings* opinion is a forcible demonstration of the misapprehension by the court below of the Regulations governing petitioner's acceptance and assignment to a CPS camp, and his status at the time he received the order to report for work at the camp. The court below said that "after reviewing *Estep* and *Smith* cases in detail and noting that no attempt is made therein to reverse *Falbo* v. *United States* (supra), we conclude that the *Falbo* and not the *Estep* and *Smith* decisions apply here. We believe the cases are identical since neither Falbo nor Dodez had exhausted his administrative remedies by reporting for induction. In the case at bar had draftee so reported and then refused to be inducted, the *Estep* and *Smith* decisions would have been controlling." [193-194]

It should be observed that it was impossible for petitioner to be inducted at the civilian public service camp. Indeed, there is no induction ceremony at the camp. There is no line drawn in the Regulations whereby a point is fixed permitting the registrant to choose between induction and refusal to be inducted with prosecution under the Act, as in the case of registrants ordered to do training and service in the armed forces. In the case of registrants classified as conscientious objectors, the Regulations provide that the registrant is under the jurisdiction of the camp to which he is assigned after leaving the local board where he has reported in pursuance to the order commanding him to do work of national importance. (Reg. 652.13) It is manifest that the court below confused the distinction between the well defined procedure of registrants ordered to do work of national importance and registrants ordered to do training and service in the armed forces. The fact that one classified in 1-A may not exhaust his remedies until he has undergone the final physical examination at the induction station given by the armed forces upon his reporting pursuant to an order to report for induction, cannot be taken as a guide for determination that a registrant classified in IV-E has not exhausted his remedies until he has reported at the civilian public service camp. Since it is impossible for a registrant to be rejected at the civilian public service camp, and inasmuch as there is no physical examination given at said camp for the purpose of determining the acceptability of the registrant, it is unnecessary for one classified as a conscientious objector to report to the local board or to the CPS camp in response to an order to report for work of national importance in order to exhaust his administrative remedies. Indeed the remedies have been exhausted upon the taking of the pre-induction physical examination long before the order to report for work of national importance is issued.

Petitioner was not indicted for failing to perform any

one of the steps in the selective process, but was prosecuted and convicted for not having reported for the sole purpose of submission to work of national importance. The last step in the selective process had been completed before the order to report for work of national importance had issued. He was indicted, prosecuted and convicted for refusal to report for work of national importance and not for failing to take the last step in the selective process.

Therefore petitioner's refusal to report for service at the camp is the only assignable reason why the court below ruled that he could not contest the legality of his classification in defense to the indictment. But under the above quoted portion of the *Billings* opinion petitioner did not have to be "actually inducted" or report for work of national importance in order to raise his defense. He did not have to report to the camp, be assigned and start to work there, any more than did *Billings* have to take the army oath, be assigned to service in the armed forces and shoulder a gun. When petitioner was found physically fit and acceptable for general military service upon his preinduction physical examination at the induction station *he was "acceptable* for work of national importance under civilian direction." (Italics added) (Reg. 651.31 (a) (1)) He had been officially and finally *accepted,* as indicated by the subsequent notice to report to camp, sent by the Director of Selective Service who is in charge of the CPS camps. (Reg. 653) Thus petitioner exhausted his administrative remedies and, under the rules set forth in the *Falbo* opinion itself as amended and clarified by the *Billings* opinion, he was then in a position to urge the illegality of his classification as a defense against the indictment.

In the *Billings* opinion (*supra*) it was said that the fact that one may have been accepted several weeks before he was ordered to report for induction would not alter the case. The fact that petitioner may have been accepted several weeks before he was ordered to report for work of

national importance did not change the fact that he was actually accepted for work of national importance in a CPS camp. The final irrepealable order of General Hershey assigning him to do work of national importance had been theretofore issued. In *Billings* v. *Truesdell, supra,* it is said: "It is difficult to see why there would be a difference in result if the interval between the time when he is found acceptable or is accepted and the ceremony of induction were only a few minutes, as in the present case, rather than a few weeks." It is only administrative remedies that one is required to exhaust in order to qualify himself for judicial review. Inasmuch as there was no possibility of petitioner's obtaining any remedy by being rejected at the civilian public service camp, it was unnecessary for him to report at the camp to do work of national importance. The Regulations are now adverted to show that there was no remedy available to him at the camp. Section 653.13 of the Regulations provides that the registrant is under the jurisdiction of the camp after leaving his board, following his reporting at the board to be transported to the camp. Section 653.11 (a) requires the director, on arrival of the registrant at the camp, to fill out the order to report for work of national importance. Section 653.11 (c) of the Regulations declares that acceptance at the camp is completed by filling out the order to report. Section 653.11 (b) provides for a cursory physical examination, but inasmuch as Section 653.11 (c) provides that acceptance shall be made irrespective of the physical examination, it is impossible for a registrant to be rejected at the camp.

In the Government's brief (pp. 15-16) filed with the Court in *Gibson* v. *United States,* No. 221 October Term 1945, *supra,* it is said, *inter alia,* "We are unable to agree with petitioner (Br. 17) that it is necessary for a registrant to undergo the physical examination at the camp 'in order to finalize and complete his acceptance at the camp.' Since every registrant who has passed his preinduction physical

examination and is assigned to a camp by the Director of Selective Service must be accepted at the camp (Reg. 653.11 (c)), it is plain that the examination at the camp is not a part of the process of determining the registrant's acceptability. Indeed, in petitioner's case, he was accepted at the camp several days before he was examined by the camp doctor (see fn. 8, p. 17, and pp. 53-58, *infra*).

"... It is in this latter respect that the procedure differs from that which prevailed at the time of *Falbo's* case. At that time it was possible for a registrant to be rejected upon examination at the camp (see 320 U. S. at 553) and the procedure thus paralleled the procedure for inducting men into the armed forces. . . .

"Unlike the procedure which prevails for registrants going into the armed forces (see *Billings* v. *Truesdell*, 321 U. S. 542, 553-554), in the case of a registrant assigned to a Civilian Public Service Camp there is no induction process. The reason for the difference in procedure may be found in the fact that only a registrant who has claimed exemption from military service because he is conscientiously opposed to all war is classified IV-E and assigned to a camp. Section 5 (g) of the Act requires that any person 'claiming such exemption' shall 'be assigned to work of national importance.' Since by asserting the claim the registrant necessarily acquiesces in his assignment to work of national importance, there is no occasion for an induction ceremony in which he will be able to choose between submitting to work of national importance and defying the Act."*

It would be a hollow formalism to require petitioner to report for work of national importance and to appear at the camp for the mere purpose of having the director fill out a form showing that he had been accepted, when there

*The material mentioned in footnote 5 of the Government's brief in the *Gibson* case (quoted above) is a letter from the Selective Service System to the Attorney General, which letter is set forth in said brief at pages 53-58.

is no possibility for appellant to get any relief by being rejected. Indeed, Section 653.12 of the Regulations makes it a mandatory duty for a registrant to remain at the camp after reporting there. Such further step of reporting need not be complied with as a condition precedent to judicial review: *Utley* v. *St. Petersburg*, 292 U. S. 106; *Kansas City S. Ry.* v. *Ogden Levee Dist.* (CCA-8) 15 F. 2d 637. See also *Gonzales* v. *Williams*, 192 U. S. 1, 15, where, with reference to an argument about exhaustive administrative remedies, the court said: "She was not obliged to resort to the superintendent or the secretary."

The efforts on the part of the court below to hold the action of the trial court in rejecting evidence pertaining to, and in refusing to consider or permit the jury to consider whether the local board had denied petitioner a full and fair hearing, was harmless error, fails to make the judgments of the courts below impervious to attack here. A similar effort was attempted by the court of appeals in the case of *Smith* v. *United States*, 148 F. 2d 288. (See the last point discussed in that opinion) This Court reversed the judgment in the *Smith* case because the trial court refused to exercise its judicial function. There the trial court failed to pass upon the issue raised. It refused to permit the jury to consider the issue. The questions for determination by the court and jury were limited to whether or not the defendant complied with the order. The same failure to exercise the judicial function is prevalent here. The trial court did not pass upon the merits of petitioner's defense. It was error for the court of appeals to weigh the merits of the defense in affirming the judgment. If the Court of Appeals can consider the defense, then it was also the duty of the trial court to consider the defense. Inasmuch as the trial court did not consider it or permit the jury to consider it, the error cannot be cured by the rationalization of the court of appeals. (*Smith* v. *United States, supra*)

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed; in event the writ of certiorari is granted petitioner prays that this cause be set for argument simultaneously or consecutively with No. 221, October Term 1945, *Gibson* v. *United States*, which has been ordered restored to the docket for reargument before the full court; and petitioner further prays that the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner should be reversed and petitioner discharged, or, in the alternative, the judgments should be reversed and a new trial ordered.

Respectfully submitted,

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